

**DECISION****THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548**

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**FILE:** B-212481**DATE:** February 2, 1984**MATTER OF:** Sergeant First Class Charles J. O'Fearna,  
USA (Ret.)

**DIGEST:** A retired member of the Armed Forces who becomes a citizen of a foreign country by naturalization and who voluntarily renounces his United States citizenship loses the right to retired pay since entitlement to retired pay depends upon the continuation of the individual's status as a retired member of the military service available for service as required and that status is incompatible with renunciation of United States citizenship. However, such a person who elected to participate in the Survivor Benefit Plan and from whose retired pay the required deductions were being made for coverage under the Plan when he renounced his U.S. citizenship, may continue coverage under the Plan by making the required payments into the Treasury.

Former Sergeant First Class Charles J. O'Fearna seeks restoration of his military retired pay which was terminated upon his becoming a citizen of Australia. The question is also raised as to whether Mr. O'Fearna may continue participation in the Survivor Benefit Plan if his retired pay is terminated provided he deposits the amounts in the Treasury which would otherwise be deducted from his retired pay. Retired pay may not be reinstated because a continuing status as a retired member of the Army is not compatible with renunciation of United States citizenship; however, he may continue participation in the Survivor Benefit Plan by making the required payments.<sup>1</sup>

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<sup>1</sup> A voucher for payment of retired pay covering the period May 1, 1982, through May 31, 1983, in the amount of \$8,278.75 was submitted for consideration by Mr. J. E. Boone, Special Disbursing Agent, U.S. Army Finance and Accounting Center, Indianapolis, Indiana 46249. Since we have concluded that the voucher may not be paid it will be retained in our Office.

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Facts

Although we have not been furnished a complete history of Mr. O'Fearn's service, the facts given are sufficient for purposes of the questions presented. On July 31, 1965, he was retired after serving over 22 years in the Regular Army. As required by law he was transferred to the Army Reserves until the completion of a total of 30 years active and Reserve service, at which time he was fully retired. 10 U.S.C. § 3914. However, notwithstanding his Reserve status, Mr. O'Fearn moved to Australia in 1966, where he has lived ever since. On December 21, 1972, he elected to participate in the Survivor Benefit Plan to provide an annuity for his wife upon his death. Apparently, the required deductions were made from his monthly retired pay payments to cover the cost of his participation in the Plan. See 10 U.S.C. § 1452.

The questions of retired pay entitlement and Survivor Benefit Plan participation result from the fact that Mr. O'Fearn became a naturalized citizen of Australia on April 29, 1981. Mr. O'Fearn continued to receive his retired pay until May 1, 1982, at which time the Department of the Army terminated his retired pay on the basis that he was an Australian citizen. Apparently this action was initiated as a result of a letter Mr. O'Fearn wrote to the Finance Center asking that Federal income tax withholding from his retired pay be discontinued in view of the fact that he had become a citizen of Australia. In response the Finance Center advised that if a retiree loses his U.S. citizenship he also loses his entitlement to retired pay. In addition to having his retired pay stopped, Mr. O'Fearn was advised that he would have to refund the retired pay he received for the period from April 29, 1981, through April 30, 1982.

Because he became an Australian citizen, Mr. O'Fearn was issued a Certificate of Loss of Nationality of the United States by the U.S. Department of State expatriating him as of the date he became a

naturalized Australian.<sup>2</sup> The Certificate of Loss of Nationality was issued by the Department on August 5, 1982, and forwarded to Mr. O'Fearna by letter from the Consulate General in Sydney, Australia, on August 26, 1982. Instructions were included for appeal of the "loss of nationality," but there is no indication that an appeal was ever filed. Mr. O'Fearna's attorney does not base his argument for restoration of retired pay on the question of whether Mr. O'Fearna lost U.S. citizenship, and it appears that the loss of citizenship is admitted.

It is noted that loss of U.S. citizenship requires a specific intent and action by the individual concerned to renounce U.S. citizenship. See Vance v. Terrazas, 444 U.S. 252 (1979); Terrazas v. Haig, 653 F.2d 285 (1981) (on remand). However, the action by the Department of State in issuing a Certificate of Loss of Nationality which to our knowledge has not been revoked or even questioned is determinative of that issue for purposes of this decision.

#### Retired Pay

We have held that a military retiree is no longer entitled to receive retired pay if he loses U.S. citizenship by acquiring foreign citizenship. 44 Comp. Gen. 51 (1964); Matter of Snyder, 58 Comp. Gen. 566 (1979). This position is predicated on the fact that the military status of a retired member continues after retirement and the right to retired pay is dependent upon continuation of that status. 37 Comp. Gen. 207, 209 (1957). A retired member remains a part of the Army and his right to retired pay is contingent upon maintaining his military status. In some cases citizenship is not a requirement for enlistment in the Armed Forces if the individual owes allegiance to the United States. However, a member's loss of his U.S. citizenship as a

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<sup>2</sup> Under section 349 of the Immigration and Nationality Act, June 27, 1952, ch. 477, 66 Stat. 166, 267, as amended, 8 U.S.C. § 1481, the term loss of nationality is used, which is broader than "citizenship" since it includes certain non-citizens who owe permanent allegiance to the United States. 8 U.S.C. § 1101(22). For purposes of this decision, loss of citizenship, the more familiar term, is used in lieu of loss of nationality in some instances.

result of his own voluntary renunciation thereof in order to acquire citizenship in a foreign country would be inconsistent with his enlistment oath to bear true faith and allegiance to the United States. 10 U.S.C. § 502 (1976). All members on the retired list of the Regular Army remain a part of that force and are relied upon as a dependable source of manpower as is evidenced by congressional intent in enacting 10 U.S.C. § 3504 (1976). The principles upon which military retired pay is based have not changed since the cited decisions were rendered and no court has reached a contrary conclusion. We find no legal basis to alter the conclusions reached in those cases.

With respect to the loss of citizenship we note that a person may hold dual nationality and continue to receive retired pay, but one who is voluntarily expatriated (renounces his United States citizenship) in connection with obtaining foreign citizenship is not entitled to continuation of retired pay. See 58 Comp. Gen. 566 (1979). Since, as indicated above, Mr. O'Fearna has renounced his U.S. citizenship he has forfeited his military status and his retired pay as an Army member.

Mr. O'Fearna, through his attorney, argues that he should not be deprived of his retired pay because he was not advised that this would result from his becoming a citizen of Australia. He identifies some information which was available to Mr. O'Fearna and which might have been misleading in this regard. He points out that there was no logical reason for Mr. O'Fearna to believe that loss of retired pay would result from his becoming an Australian citizen. While it is unfortunate that Mr. O'Fearna was not aware of our holdings with respect to the consequences of loss of United States citizenship, that conclusion was discussed in several of our decisions and the loss of retired pay as a result of such action was the unequivocal result. See 44 Comp. Gen. 227 (1969). In any event it would seem that a reasonably prudent person, particularly a retired military member, would carefully inquire as to the consequences of taking such a momentous action as giving up his citizenship.

Mr. O'Fearna's attorney also argues that the termination of his retired pay resulted in a violation of his constitutional right to due process. In the

loss of his citizenship the Department of State gave Mr. O'Fearna access to a hearing. We find no support for a finding that further proceedings are required to establish the consequential loss of retired pay as is clearly required by our decisions. In this regard Mr. O'Fearna's attorney argues that retired pay should be characterized as deferred compensation for prior service in which the retired member has a property right similar to an annuity or pension. However, the Federal courts and our decisions have long recognized that military retired pay of the type Mr. O'Fearna claims is reduced compensation for reduced current services which the member receives by virtue of maintaining his status as a member of the service. See discussion and authorities cited in Lemly v. United States, 109 Ct. Cl. 760, 762-763 (1948); McCarty v. McCarty, 453 U.S. 210, 221-223 (1981); and Matter of Walker, 62 Comp. Gen. 406, 408 (1983).

Finally, with respect to the argument that individual exceptions to the loss of retired pay are authorized by 44 Comp. Gen. 51, the rule stated therein is absolute if a loss of citizenship has been established. While the use of the phrase "it would seem that loss of citizenship" is not direct, the consequences of the loss of citizenship was in no way modified. The result was clear. One who has lost United States citizenship as a result of voluntarily becoming a citizen of another country forfeits his retired pay. That result was not dependent upon other factors such as knowledge of our decisions, good faith, or hardship.

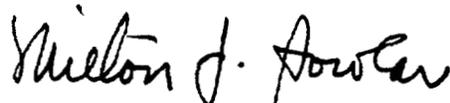
For the reasons stated we find that Mr. O'Fearna's retired pay should have been discontinued as of April 29, 1981. He is not entitled to further payments of retired pay and is in debt to the Army for any payments made subsequent to that date.

#### Survivor Benefit Plan

As is indicated above, Mr. O'Fearna began participating in the Survivor Benefit Plan in December 1972 while he was still entitled to retired pay since he had not yet renounced his U.S. citizenship. In this regard 10 U.S.C. § 1452(d) provides:

"(d) If a person who has elected to participate in the Plan has been awarded retired or retainer pay and is not entitled to that pay for any period, he must deposit in the Treasury the amount that would otherwise have been deducted from his pay for that period, except when he is called or ordered to active duty for a period of more than 30 days."

Since Mr. O'Fearnna elected to participate in the Plan and has been awarded retired pay but is no longer entitled to it for the reasons discussed above, his situation falls within the plain language of section 1452(d). In these circumstances he may continue his participation in the Plan by making the required payments into the Treasury.

*for*   
Comptroller General  
of the United States